Supreme Court, U.S.
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No. 97-797

In The

Supreme Court of the United States

October Term, 1997

YANKEE ENTERPRISES, INC.,

Petitioner,

vs.

DUNKIN' DONUTS INCORPORATED,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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Pursuant to Rule 15.6, Petitioner Yankee Enterprises, Inc. ("Yankee") files this Brief in Reply to Respondent's Brief in Opposition, in order to address new points raised in the Brief in Opposition.

I.

This case was brought because Yankee, a Dunkin' Donuts, Inc. ("Dunkin') franchisee, began experiencing an inexplicable decline in sales growth. It is undisputed that the Yankee store was extremely well-run and well-managed. It became apparent that Yankee's problems were being caused by outside influences: namely, that Dunkin', in an attempt to exit the West Zone, was decreasing supervision over and support to West Zone stores, causing a decline in standards through out the region that adversely effected Yankee. Respondent's argues on Page 2 of its Brief in Opposition that Yankee's witnesses could not testify as to any adverse effect caused by Dunkin's breach of its franchise agreement, and specifically its agreement to "maintain high and uniform standards of quality, cleanliness, appearance and service at all Dunkin' Donuts shops." This characterization of the testimony presented at trial is a misstatement of the testimony offered by Yankee's witnesses at trial. Yankee's witness, as well as exhibits and the franchise agreement itself, established that franchisees share the reputation of the franchise as a whole; therefore, each franchisee is impacted by the actions of all other franchisees within the same region to the extent that those actions adversely impact the reputation and goodwill of the franchise. It is, after all, for use and enjoyment of the good name and good will of the franchise that franchisees pay franchise fees. There was abundant testimony to support this fact by Yankee expert Harold Brown, and by other Dunkin' franchisees.

All franchisee witnesses who conducted business in the West Zone testified that the West Zone had the lowest standards of

all regions; only two franchisees from other regions testified otherwise. Profuse testimony quite critical of standards was given as to virtually all geographical areas surrounding Yankee. Lower standards caused lower sales though lower advertising funds and reduced goodwill; all of these factors adversely impacted Yankee. For Dunkin' to argue that there is no relationship between standards and sales is disingenuous; Dunkin's own Franchise Agreement emphasizes the relationship between sales and profits. (Exhibit 2, Para. 3C). The quotes cited by Dunkin' in its Brief are taken out of context and do not accurately reflect the testimony presented at trial. Yankee would urge this Court to request the record in this case in order to fully appreciate the testimony elicited at trial.

II.

Dunkin', on page 9 of its Brief in Opposition, argues that Yankees' Petition for Writ of Certiorari presents issues to this Court not previously addressed below and on Page 13, Dunkin' incorrectly asserts that the "Questions Presented" by Yankee in its Petition for Writ of Certiorari misrepresent the rulings of the Fifth Circuit. It should not be surprising that new issues are addressed in Yankee's Petition, as previously Yankee was responding to a challenge to the trial court's judgment below, and before this court Yankee is addressing errors in the Fifth Circuit's ruling.

In examining the Fifth Circuit's ruling, it is clear that the Fifth Circuit did not examine the record for evidence of breach of contract. Dunkin' argues that the Fifth Circuit could find "no evidence of damages" sustained by Yankee, but it is impossible to determine "no damages" were sustained by Yankee while failing to examine the issue of breach. The Fifth Circuit failed to take the necessary and logical step of carefully examining the record for breach to determine (1) whether a breach occurred and (2) what detrimental effect the breach had

on Petitioner. The Fifth Circuit erred in failing to examine the record as to the nature, extent and potential for damage to West Zone franchisees-especially: (1) when abundant testimony and Dunkin's self written documentation supported Yankee's theory that a reduction in standards has a direct and detrimental effect on sales; and (2) when Dunkin' admitted that it was choosing to develop markets elsewhere, rather than in the West two/thirds of the United States; and (3) when a conspiracy to exit the West Zone markets was exposed, (using Dunkin's own testimony and documents); and (4) when evidence proved that huge sums of West Zone advertising monies were diverted from the West; and (5) when there was a 91% reduction in West Zone personnel followed by the shutting down of the entire West Zone office; and (6) when franchisees complained bitterly in Dunkin's own records of loss of services and collapse of sanitation and safety standards in the West Zone; and (7) when the Dunkin' defense witness designated as "most knowledgeable", Mr. Fleck, testified that the West Zone suffers from all of these and other ills as proven so in exhibits he authored. The Fifth Circuit should have considered both the nature and the extent of the breach in order to examine what damages were caused by the breach.

III.

In response to the argument raised by Dunkin' on page 10 of its Brief in Opposition that Yankee has misrepresented that Dunkin' diverted advertising funds from the West Zone, Yankee would refer this Court to the evidence presented below. The testimony of Yankee owner Greg Nelson clearly established that Dunkin' had been diverting advertising money for years. Mr. Nelson's testimony has not, and cannot be, contested or controverted by Dunkin'. In its Brief in Opposition, Dunkin' refers to audited "National Advertising Fund" reports that indicate that the West Zone received more in benefits than it paid into the National Advertising Fund; Dunkin' fails to mention that this occurred in only one year, 1994. As the testimony of

Mr. Nelson established, there were many, many years (at least back to 1985) in which Dunkin' siphoned off advertising dollars from the West Zone for the benefit of the Northeast region, (Tr. 217), which in conjunction with the differences in store operating standards explains the "gap" in sales addressed by the Fifth Circuit. Lacking advertising funds and acceptable operating standards, sales increases in the West Zone were negligible, while increases in the Northeastern Zone were spectacularly high because the Northeastern Zone benefitted from both high standards and augmented advertising monies. This evidence alone supports the jury's finding that Dunkin' engaged in "unconscionable conduct" and clearly establishes that Yankee was damaged by Dunkin'.

The Fifth Circuit further erred in failing to recognize the relationship of standards to sales. The Franchise Agreement forming the basis of this breach of contract lawsuit recognizes that the maintenance of high and uniform standards are critical to the successful operation of the franchise. Moreover, Dunkin's own documents establish a straight line relationship between reduced standards and lower sales. The evidence at trial of damage to Yankee was supported by witnesses, documents, and common sense. The Fifth Circuit's opinion requires correction. According, Yankee respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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